Filed 6/6/03 McLaughlin v. Santa Monica Com. College Dist. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

REGINA MCLAUGHLIN, Plaintiff and Appellant, v. SANTA MONICA COMMUNITY COLLEGE DISTRICT, Respondent and Real Party in Interest.	B156707 (Los Angeles County Super. Ct. No. BS065536)

APPEAL from the judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Regina McLaughlin, in pro. per., for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, Warren S. Kinsler and Alan G. Atlas for Respondent and Real Party in Interest Santa Monica Community College District.

Plaintiff and appellant Regina McLaughlin appeals from the judgment entered on December 18, 2001, against her and in favor of real party in interest Santa Monica Community College District (the district), denying appellant's petition for peremptory writ of mandate seeking to compel the district to set aside its decision under Education Code section 87608.5,[1] not to continue appellant's employment for a third and fourth consecutive year. We understand her contentions to be as follows: (1) the superior court used an incorrect standard of review of the arbitrator's findings and award; (2) the district did not evaluate her employment status in accordance with the Education Code, its own administrative regulations or the applicable Collective Bargaining Agreement;[2] (3) the award was not supported by substantial evidence because the district's only witness at the arbitration hearing gave false testimony; (4) appellant has a right to continued employment with the district; and (5) the district is estopped from arguing the applicability of a provision in the Education Code. After review, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1987, appellant began working for the district as a teacher in the Santa Monica College Children's Center. In August 1988, she accepted a position as Head Teacher/Director of the Children's Center. In late summer 1992, appellant left the child care center to accept a full-time position at the college as a First Year Contract Instructor for the 1992-1993 academic year, during which she taught Psychology 11, Child Development 45 and Child Development 64.

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[1] All further undesignated section references are to the Education Code.

[2] Neither Appellant's Appendix nor Respondent's Appendix contains a copy of the Collective Bargaining Agreement. Appellant attaches what she represents to be a copy of Article 7 of the agreement as an exhibit to her Reply Brief. We treat these attachments as a reply appendix within the meaning of California Rules of Court, rule 5.1(b)(7).

Appellant's evaluation committee included Division Head Dorothy Gelvin and English professor Karen Costello. In her December 1992 evaluation report, Costello lauded appellant as a "fine teacher," and rated her as "strong" in every category. After appellant's first year, however, the full committee began to develop concerns about the content and level of presentation of her courses, particularly Psychology 11. Nevertheless, the district offered and appellant accepted a contract to continue her employment with the district as a Second Year Contract Instructor for the 1993-1994 academic year.

On September 14, 1993, the full evaluation committee met with appellant in a combined final evaluation of her first contract year and first evaluation committee meeting of her second contract year. Because of their concerns about appellant's performance, the committee determined to provide appellant with a mentor to help her improve the rigors of her Psychology 11 class. In accordance with administrative regulation 4115A (hereafter AR-4115a), each member of the evaluation committee observed appellant teach various classes during the ensuing semester.

In the spring of 1994, appellant's evaluation committee voted unanimously not to offer her a third year contract. According to a document entitled "Committee/Department Chair Evaluation Report for Certified Personnel," classroom observations of appellant during the first semester of her second year revealed "errors in content, disorganized presentation, self-deprecating remarks undermining the presentation of lecture material, and inability to follow her lecture outline . . . ." Appellant was assigned a mentor to assist her in improving these perceived deficiencies. Following the mentoring period, the evaluation committee re-observed appellant's classroom performance. Despite some improvement, the committee's concerns were not altogether alleviated. The report concluded that a third and fourth year contract could not be recommended. In a letter dated March 4, 1994, appellant was advised that her second year probationary evaluation would take place at 2:30 p.m. on March 7. That letter indicates a copy of the report was attached.

On March 10, 1994, Richard Moore, superintendent of the district and president of the college, notified appellant that he was recommending to the Board of Trustees that appellant not be offered a contract for the 1994-1995 academic year, pursuant to section 87608.5. The notice specified nine reasons, referred to copies of appellant's evaluations for the 1992-1994 academic years, and advised appellant she was invited to attend and address the board at a March 14 Board of Trustees meeting.

In a letter dated March 15, 1994, appellant was informed that the board had elected not to enter into a third year contract with her for the 1994-1995 academic year. The letter specified seven reasons for the decision, and stated appellant had been evaluated in accordance with the provisions of section 87660 et seq. Appellant's last day of employment with the district was June 17, 1994.

Preliminary to filing an action for wrongful termination, appellant set about exhausting her administrative remedies. On July 11, 1994, she orally requested a union contractual grievance hearing pursuant to Education Code section 87610.1. In a letter dated July 14, 1994, the Administrative Dean of Instruction advised appellant her grievance was untimely under the district's Collective Bargaining Agreement. Appellant's administrative appeal of that decision was denied and, on July 28, her grievance was finally denied as untimely. On November 9, 1994, the matter was submitted to arbitration on the issue of timeliness only. In an award dated July 8, 1995, the arbitrator concluded appellant could not arbitrate the substance of her untimely grievance under the Collective Bargaining Agreement and section 87610.1.

On October 10, 1995, appellant filed a petition for writ of mandate to set aside the arbitration award. The petition was denied and judgment was entered against appellant. Appellant appealed from the judgment and, in an opinion filed on October 1, 1997, Division One of this court (*McLaughlin v. Gentile*, No. B105724) reversed the judgment and remanded the matter "for a substantive hearing as provided by statute on the issues of evaluation and retreat rights, if any, of appellant." The court found the March 14 letter did not comply with section 87740, subdivision (b) because it did not advise appellant of

her right to request a hearing. The court concluded: "Although appellant, as a second year contract employee, does not have the right to challenge the substantive decision of non-reelection [see § 87608.5], she does have the right to a hearing to determine if she was evaluated in accordance with the legislative evaluation scheme. Appellant has been denied the right to a hearing for the purpose of determining whether a statutory right which she has has been abridged, without being given the mandated statutory notice which would apprise her of that right."

Upon remand, the following issues were submitted to arbitration on December 3, 1999: "Was [appellant] evaluated as provided by statute; and is she entitled to retreat rights?" After a hearing, the arbitrator affirmed the district's decision to terminate appellant's employment, finding appellant had been evaluated in accordance with the Education Code. He also found appellant was not entitled to "retreat rights" to her former position as head teacher at the Children's Center.[3]

Appellant's second petition for peremptory writ of mandamus challenging the arbitration award was denied by the trial court. In a tentative ruling, which it then adopted as its written statement of decision, the court concluded the arbitrator's finding that appellant had been evaluated in accordance with the Education Code was supported by substantial evidence. Noting appellant had abandoned the claim of a right to retreat to her former position as head teacher at the Children's Center and was seeking solely to be reinstated as a contract employee, the trial court found the prior appellate court opinion conclusively resolved that appellant did not have the right to challenge the substantive decision of the board not to offer her a third year contract.

Judgment was entered on December 18, 2001. A timely notice of appeal was filed on February 13, 2002.

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[3] Regarding "retreat rights" appellant told the arbitrator at the hearing: "I have no intention of asking for retreat rights, for one main reason, is that there's nothing to retreat to. [¶] The Child Development Center . . . is no longer on campus. So you haven't read my brief, and I'll give you an idea that's not what I'm asking for."

DISCUSSION

The Legislative Scheme, Administrative Regulations Collective Bargaining Agreement, And Writ Review

We begin with a brief overview of the legislative scheme, related administrative regulations, and provisions of the Collective Bargaining Agreement. All district academic employees are either "contract employees," "regular employees," or "temporary employees." (§ 87604.)[4] For the first academic year of employment with the district, each faculty member must be employed by contract. (§ 87605.) At the completion of the faculty member's first academic year, the district has discretion to decide whether to enter into a contract with the faculty member for the following academic year, to not enter into such a contract, or to employ the contract employee as a regular employee for all subsequent academic years. The decision is subject to only limited judicial review. (§ 87608.) The district enjoys the same discretion following completion of the faculty member's second academic year: "If a contract employee is working under his or her second contract, the governing board, at its discretion and not subject to judicial review except as expressly provided in Sections 87610.1 [allegations that district violated its own policies shall be addressed as grievances] and 87611, [judicial review of final decision], shall elect one of the following alternatives: [¶] (a) Not enter into a contract for the following academic year. [¶] (b) Enter into a contract for the following two academic years. [¶] (c) Employ the contract employee as a regular employee for all subsequent academic years." (§ 87608.5.)

Before the district may exercise its discretion vis-à-vis continued employment of a contract employee, the district must evaluate the employee in accordance with the evaluation standards and procedures established in accordance with specified provisions of the Education Code. (§ 87606.) In pertinent part, section 87633, requires the

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[4] A "contract employee" means an employee of a district who is employed on the basis of a contract in accordance with subdivision (b) of section 87608.5. (§ 87601.)

evaluation be "conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district." (§ 87663, subd. (b).) In accordance with section 87663, the district established AR-4115a. Regulation AR-4115a requires the evaluation committee for a second-year probationary or temporary contract faculty member to meet by the end of the fourth week of the first semester of the faculty member's second year to discuss the evaluation procedure. By the end of the eighth week of the first semester of the second year, AR-4115a requires a minimum of four classroom or service evaluations to have been performed, at least one by each member of the evaluation committee. Each member is required to have a conference with the teacher within one week after that committee member's classroom observation. Following that conference, the committee member is required to complete and sign a report, which must be placed in the faculty member's file. A full committee meeting with the teacher is required by the end of the 12th week of the semester. The final evaluation form "should be prepared and signed by the faculty member and the members of the committee." The committee should conclude its evaluation with a recommendation to rehire or not to rehire the faculty member, which is forwarded to the Board of Trustees for action.

Consistent with AR-4115a, Article 7 of the Collective Bargaining Agreement requires the faculty member be given an opportunity to meet with each evaluator to discuss the evaluation before the evaluation is placed in the employee's file (Article 7.6); each evaluator to sign the final evaluation (Article 7.62); and the faculty member to be given up to 10 days to file a written response to the final evaluation (Article 7.63).

"The governing board shall give written notice of its decision under Section 87608 or 87608.5 and the reasons therefor to the employee on or before March 15 of the academic year covered by the existing contract. . . . Failure to give the notice as required to a contract employee under his or her first or second contract shall be deemed an extension of the existing contract without change for the following academic year." (§ 87610, subd. (a).) "No later than March 15 and before an employee is given notice by

the governing board that his or her services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor. . . . [¶] (b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing must be in writing and must be delivered to the person who sent the notice pursuant to subdivision (a) . . . . If an employee fails to request a hearing on or before the date specified, this failure to do so shall constitute a waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision." (§ 87740, subd. (a).)

A contract employee's allegation that the district's decision not to offer a second year contract violated the district's policies and procedures concerning the evaluation of probationary employees is procedurally addressed as a grievance under the Collective Bargaining Agreement. (§ 87610.1, subd. (b).)[5] "A final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1 shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure." (§ 87611.)

In pertinent part, Code of Civil Procedure section 1094.5 provides: "(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . . [¶] (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.

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5 A grievance procedure is set forth in sections 12.1 through 12.3.9 of the Collective Bargaining Agreement.

Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. [¶] (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Standard of Review

Appellant contends the trial court erred in not independently reviewing the evidence submitted to the arbitrator and instead determining the award and findings were supported by substantial evidence. She argues independent review was required pursuant to Code of Civil Procedure section 1094.5, subdivision (d). She is incorrect.

In pertinent part, that subdivision provides: "[I]n all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code [use of health facility by duly licensed podiatrists], and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence."

Appellant's petition had nothing to do with the use of a health facility by a podiatrist. Accordingly, her reliance on subdivision (d) of Code of Civil Procedure section 1094.5 is misplaced.

Nor is this a case in which the court is otherwise authorized by law to exercise its independent judgment on the evidence within the meaning of Code of Civil Procedure section 1094.5, subdivision (c).[6] Such cases are those administrative decisions that

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[6] To the extent respondent suggests otherwise, it is also incorrect.

substantially affect a fundamental vested right, such as an administrative determination to suspend or revoke a professional license or certification. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811-816, fn. 8, citing *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) Appellant had no fundamental vested right to a contract for a third year and fourth year of employment with the district. On the contrary, section 87608.5 gives the board discretion to elect not to offer appellant continued employment and expressly makes the exercise of that discretion *not subject to judicial review*.

In the context of employment decisions in academic settings, the court in *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, explained the public policy reasons for leaving such matters to the discretion of the administrative body: " '. . . it is beyond cavil that generally faculty employment decisions comprehend discretionary academic determinations which . . . entail review of the intellectual work product of the candidate. That decision is most effectively made within the university and . . . it is generally acknowledged that the faculty has at least the initial, if not the primary, responsibility of judging candidates.' [Citation.] '. . . it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.' [Citation.]" (*Id.* at p. 1724-1725.) "Only one group of people is suited to undertake the responsibility of making these decisions: the candidate's academic peers who are knowledgeable about the candidate's chosen field of study and about the particular needs of the institution. These peers, unlike nonacademics, are equipped to evaluate the candidate's teaching and research according to their conformity with methodological principles agreed upon by the entire academic community. They also have the knowledge to meaningfully evaluate the

candidate's contributions within his or her particular field of study as well as the relevance of those contributions to the goals of the particular institution. Moreover, because their individual academic reputations are intertwined with that of the university, the candidate's peers have the greatest stake in choosing people whose future work will reflect favorably on the institution." (*Id.* at p. 1726, fns. omitted.)

Accordingly, the issues that are cognizable on appeal here are subject to the "substantial evidence in light of the entire record" rule under Code of Civil Procedure section 1094.5, subdivision (c).

Substantial Evidence Supports the Arbitrator's Finding Appellant was Evaluated in Accordance with the Education Code

Appellant's contention that the record establishes she was not evaluated in accordance with section 87660, AR-4115a or Article 7 of the Collective Bargaining Agreement is without merit. As we understand appellant's argument, it is that the final evaluation meeting and reports did not fully comply with AR-4115a or the Collective Bargaining Agreement because the classroom evaluations were not timely, the individual evaluation reports were not signed, and the full evaluation committee was not present at a scheduled March 4, 1994, meeting. The arbitrator found the timing requirements of AR-4115a were directory rather than mandatory and that appellant was not prejudiced by the failure of the evaluation committee to meet those deadlines. Accordingly, he concluded appellant "was evaluated in her position as a full-time faculty member in accordance with the legislative evaluation scheme contained in the California Education Code." These findings are supported by substantial evidence.

Gelvin testified at the arbitration hearing that she had been dean of Human Resources at the college since 1992, in which capacity she is involved in the evaluations of all the probationary faculty. She helps to administer the administrative regulations dealing with evaluation process and sometimes sits on evaluation committee panels. She estimated she had either engaged in or administered between 75 and 100 evaluation

panels. Gelvin opined the time deadlines set forth in AR-4115a are guidelines, to which the individual schedules of the committee members and the faculty member sometimes make absolute adherence impossible. With respect to appellant's evaluation, there was a delay in holding the final committee meeting following appellant's first year, because of the unavailability of a committee member. Accordingly, the final evaluation meeting for appellant's first year and the first fall meeting for appellant's second year were held jointly in the fall of 1993. Inasmuch as appellant was rehired for a second contract year, she cannot have been prejudiced by this delay.

Gelvin explained that the observations of appellant's classroom performance during the fall semester of appellant's second year occurred beyond the eighth week of the first semester. At the end of appellant's second year, some but not all final evaluation reports were signed by appellant and the committee members. Gelvin opined the absence of signatures on the reports had no impact on the evaluation process and did not violate the district's regulations.

Gelvin testified the evaluation committee met in late January or early February to consider all of the evaluations for both the first and second years and concluded that they could not recommend offering appellant a third and fourth year contract. That day or the next, Gelvin personally delivered a copy of the document to appellant, at which time Gelvin told appellant she could respond in writing prior to meeting with the full evaluation committee in early March 1994. Gelvin could not recall whether the full evaluation committee took place as planned on March 7 or 8, 1994. She testified a full committee meeting did not always occur when the determination had been made to recommend not rehiring the faculty member.[7] In sum, Gelvin opined the appellant was evaluated in accordance with the Education Code because she received notice, received

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[7] Appellant concedes she met with the Board of Trustees before it took action on the recommendation of the evaluation committee, and provided it with written evidence that she had not been evaluated in accordance with the Education Code.

an opportunity to meet with the board, the board took action and appellant was notified of that action.

On this record, appellant has failed to demonstrate how she was prejudiced by the failure to hold observations and conferences within the prescribed time periods, by the failure of some committee members to sign the final evaluation reports, or the failure of the full evaluation committee to meet with her after the determination was made not to offer her a third and fourth year contract.

Appellant has no Right to Continued Employment with the District

Appellant contends she has a "fundamental vested property right to continued employment in the [district]." She argues she had been a permanent employee for five years when she was "promoted" to a tenure track child development instructor. The evidence is to the contrary.

Appellant voluntarily left her position as Head Teacher in the child care center after she was offered the position of First Year Contract Instructor for the 1992-1993 academic year. She subsequently entered into a contract as a Second Year Contract Instructor for the 1993-1994 academic year. As a Second Year Contract Instructor, appellant had no right to continued employment. Rather, her continued employment was governed by section 87608.5, pursuant to which the district elected not to enter into a contract with appellant for the following two years, thus proceeding pursuant to subdivision (b).

False Testimony

Appellant contends Gelvin, the district's only witness at the December 3, arbitration hearing, gave false testimony. She argues the arbitrator's decision is therefore not supported by substantial evidence. Appellant, however, has failed to establish Gelvin's testimony was false. The credibility of witnesses is particularly within the province of the fact finder, here the arbitrator, not the reviewing court.

Estoppel

Appellant contends the district relied on "section 87608.5" (contract employee working under second contract) as authority for its decision not to enter into a third year contract with appellant, but "substituted Section 876*80*.5 to concealed [*sic*] Section 87609 [contract employee employed under third consecutive contract], Appellant's legal status." (Italics added.)

There is no section 87680.5 in the Education Code. Any reference to "section 87680.5" was apparently a typographical error resulting from the transposing of the second number 8 and the 0 in "87608.5." We do not agree that the district should be estopped from arguing the applicability of the correct section by a typographical error.

The Nature of the Position for Which Appellant was Hired

Appellant contends she was hired to teach courses in child growth and development, but was terminated for her "lack of solid grounding in *theory* of developmental psychology" and because she did not have a grasp of the subject matter of the foundation course "Child Development and Growth," a course which appellant claims did not exist. We understand her argument to be that the district's reason for not entering into a third year contract with appellant were a sham. Division One found appellant, "as a second year contract employee, does not have the right to challenge the substantive decision of non-reelection." Inasmuch as this contention attempts to do just that, it must fail.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

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RUBIN, J.

We concur: COOPER, P.J.
BOLAND, J.